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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1237

The Honorable William Walter Means,
District Judge, 14th Judicial District
Tulsa County, Oklahoma,
Petitioner,

v.

The State of Oklahoma, ex rel,
S.M. Fallis, Jr. District Attorney
of Tulsa County, Oklahoma,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. ____

WILLIAM WALTER MEANS,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Petitioner, William Walter Means, respectfully prays for a Writ of Certiorari to issue to the Court of Criminal Appeals in and for the State of Oklahoma, to review its final order granting a Writ of Prohibition to the State of Oklahoma

against Petitioner, requiring him not to enforce his order dismissing a number of CRIMINAL cases in the District Court of Tulsa County.

OPINIONS BELOW

Hearings on the Motions to Suppress in the following cases were held before the Petitioner on July 24, 1973: State v. Betty Jean Terhune, CRF 73 744; State v. Morris, CRF 73 746; State v. Combs, CRF 73 747; State v. Moses, CRF 73 748; State v. Oliver, CRF 73 740; and State v. Henry, CRF 73 877.

The original action in the Court of Criminal Appeals is appended hereto as Appendices "A" through "D".

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the order of the Court of Criminal Appeals sought to be reviewed is October 18, 1973.

2. Petitioner did petition for a rehearing (See Appendix "C") on the 1st day of November, 1973. Said application was denied on the 14th day of November, 1973. No further appeal is permitted under Oklahoma Law.

3. The statutory provision which conferes jurisdiction upon this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether police officers may arrest and charge persons suspected of selling allegedly obscene material based on their

own conclusory allegations and without first obtaining a judicial determination on the material followed by an adversary hearing on the issue, as outlined in recent U.S. Supreme Court decisions.

2. Whether the use by the State of an original proceeding to appeal an adverse ruling on a matter of law in clear contravention to well established case law and usage amounts to a denial of due process and equal protection of the law under the Fourteenth Amendment.

3. Whether, absent exigent circumstances, the denial of notice and an opportunity to be heard in an original proceeding against a State District Court Judge amounts to a denial of Due Process and lack of fundamental fairness under the Fourteenth Amendment.

STATEMENT OF THE CASE

The original proceeding sought to be reviewed here was filed by the State of Oklahoma, ex rel S.M. Fallis, Jr., District Attorney of Tulsa County, Oklahoma, in order to avoid the dismissal of a series of Criminal Cases alluded to above in the section, Opinions Below. Review is not being sought in these cases, but in the original proceeding against the District Court Judge, Petitioner herein. However, the facts and findings made in the hearing held before the Petitioner herein in those cases are necessarily the substance of the original proceeding. The transcript of the hearing held on July 24, 1973, is made a part of the record for the purposes of this Petition for certiorari.

The Petitioner concluded as a matter of fact that so-called purchases of allegedly obscene materials by police officers in these cases were mere subterfuges to get around adversary

hearing requirements in First Amendment cases. In applying recent U.S. Supreme Court guidelines announced in *Heller v. New York*, ___ U.S. ___ 93 S.Ct. 2789, 37 L.Ed. 2d 745 (1973) and in *Roaden v. Kentucky*, ___ U.S. ___ 93 S.Ct. 2796 31 L.Ed. 2d ___ (1973) to the police procedures involved, the Petitioner found these procedures constitutionally deficient, in that an officer could not unilaterally make a determination of obscenity and arrest on the spot, but could easily take a purchased item before a neutral magistrate and get an initial judicial determination, especially since in such event no danger of loss or hiding of the material would be present. He also found as a matter of fact that the procedure used was really a seizure rather than an outright sale, since the money used by the arresting officers was taken back immediately. He, therefore, entered an order sustaining the defendant's motions to suppress and ordered dismissal of the cases.

The State filed an original proceeding in the Court of Criminal Appeals, seeking a Writ of Prohibition to compel the Petitioner herein not to enforce the order of dismissal.

On the basis of this petition alone, *and without hearing, arguments or briefs,* the Court of Criminal Appeals granted the Writ without opinion on the 18th day of October, 1973.

An application for rehearing was filed on November 1, 1973, which was overruled without opinion on the 14th day of November, 1973.

The Constitutional questions raised in this Petition for Writ of Certiorari were timely raised as they arose in each stage of these proceedings.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME

I.

CERTIORARI SHOULD BE GRANTED BECAUSE IT IS THE ANNOUNCED DUTY OF THIS HONORABLE COURT TO REVIEW ALL DECISIONS WHEREIN THE SUBSTANTIAL QUESTION OF FREE EXPRESSION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION IS PRESENTED.

Petitioner relies on this Court's unyielding desire to safeguard the Constitutional guarantee of free expression as so granted by the First Amendment of the United States Constitution, *Roth v. United States*, 354 U.S. 476, 488; 77 S.Ct. 1304, 1311. An expression of this Court's desire is found in *Jacobellis v. Ohio*, 378 U.S. 184; 84 S.Ct. 1676, 1678,

> "We have been told that the determination whether a particular motion picture, book or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in an event the decision can be left essentially to the State and lower federal Courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence'. The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we can not accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the Constitutional guarantees. Since it is only 'obscenity' that is excluded from the Constitutional protection, the question whether a

> particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States*, supra, 354 U.S. at 497-498, 77 S.Ct., at 1315-1316 (separate opinion). Such an issue we think must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., 354 U.S., at 498, 77 S.Ct., at 1316, See *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, 82 S.Ct. 1432, 1437, 8 L.Ed. 2d 639 (opinion of Harlan, Jr.)"

Continuing, it was stated at page 1679,

> "Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of Constitutionally protected speech."

The fact that the judgment from which review is sought herein is an original proceeding against the petitioner as a Judge rather than within the context of a Criminal Case should not obscure the fact that the primary issue in both the original proceeding and the Criminal Cases below is an issue involving First, Fourth and Fourteenth Amendment protections. The State chose the vehicle of an original proceeding to attack the Petitioner's findings of fact and conclusions of law, and such original proceeding is reviewable herein when finalized, even though the result of that decision is to leave Criminal Cases still pending. *Madruga v. Superior Court of California*, 74 S.Ct. 298, 246 U.S. 556, 98 L.Ed. 290 (1953). *Rescue Army v. Municipal Court of City of Los Angeles*, 67 S.Ct. 1409, 331 U.S. 549, 91 L.Ed. 166 (1947).

II.

THE PETITIONER'S FINDINGS AS A DISTRICT COURT JUDGE, THAT CERTAIN POLICE PROCEDURES RELATING TO ARRESTS FOR OBSCENITY LAW VIOLATIONS ARE CONSTITUTIONALLY DEFICIENT, ARE CORRECT, AND UNLESS CERTIORARI BE GRANTED HEREIN, IMPROPER PROCEDURES WILL CONTINUE TO BE EMPLOYED TO THE ULTIMATE DETRIMENT OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS OF NUMEROUS DEFENDANTS CRIMINALLY CHARGED, AND THAT PETITIONER HAS STANDING IN THIS INSTANCE TO VICARIOUSLY ASSERT THOSE RIGHTS.

The petitioner, acting as a State District Court Judge, sustained motions to quash and suppress of defendants in obscenity prosecutions under 21 Okla. Stat. Sec. 1040.51, making it a felony to . . . sell . . . "any picture, moving picture, series of pictures, drawing, diagram or photograph of any person or animal or caricature thereof in an act or acts of sexual intercourse or unnatural copulation . . ." The Petitioner noted that officers ostensibly made purchases of suspect literature, then immediately arrested the various defendants and took back the purchase money. The petitioner found as a matter of fact that such a procedure amounted to a subterfuge, and that a proper procedure would have been to consummate the purchase and take the material to a magistrate. (Transcript. p. 16.) Such a procedural safeguard would seem to be mandated by recent U.S. Supreme Court decisions, especially *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed. 2d 1127 (1961), *Heller v. New York*, ___ U.S. ___ 93 S.Ct. 2789, 37 L.Ed. 2d 745 (1973),

Roaden v. Kentucky, ___ U.S. ___ 93 S.Ct. 2796 37 L.Ed. ___ (1973). The facts as found by petitioner indicated that the method used was in reality a seizure rather than a sale, but that the distinction is of little practical importance, since an arrest is just as much, if not more, of a prior restraint than a seizure.

Even the Court of Criminal Appeals of the State of Oklahoma recognized the impact of this decisional law in First Amendment contexts, in the recent case of *Melton v. State*, Okl. Cr., 515 P2d 239 (1973). There the original opinion approved an arrest and seizure of an allegedly obscene film without warrant by an Oklahoma City Police Officer. However, a rehearing was granted in light of *Roaden*, and the following appears therein at page 245:

> "It is this Court's opinion our original opinion on this issue is founded upon a more reasonable application of the Law of search and seizure; however, the Supreme Court of the United States has specifically stated in a case virtually identical to the case at bench the procedure this Court previously approved is not Constitutionally sufficient. We reversed our position on this matter only for the reason the highest Court in this land, by its mandate, has compelled us to do so."

This language reveals the extreme reluctance of the Court to follow U.S. Supreme Court guidelines in this area and may further explain why the Court of Criminal Appeals summarily granted a Writ of Prohibition without hearing any arguments to prevent the same rationale from being applied in bookstore cases.

The result of granting the Writ is not only to force reinstatement of cases against identified defendants, but

reinstate improper police procedures in any such cases, whether currently pending or for future actions. If the state had appealed petitioner's decision on a reserved question of law as mandated in Title 22 of Oklahoma Statutes, Sec. 1053, the criminal defendants would have been parties able to raise these constitutional claims in their own behalf. In by-passing the usual and customary method of seeking appellate review, the State has forced the petitioner into a posture of asserting these claims in their behalf. However, these rights can not be effectively vindicated in the original proceeding unless the petitioner herein be characterized as their appropriate representative. Many cases before this Court have heretofore supported such an assertion of rights, and in the present case the petitioner must speak for those who are most directly prejudiced by the final order granting prohibition entered by the Court of Criminal Appeals of the State of Oklahoma. Some of those cases include *Barrows v. Jackson*, 345 U.S. 249, 73 S.Ct. 1031 (1953), *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, ___ L.Ed. 2d ___ (1965) and other cases cited therein. However, petitioners own rights have been directly infringed, as will be shown below.

III.

THE WRIT OF PROHIBITION SOUGHT FOR AND RECEIVED BY THE STATE WAS AN IMPROPER METHOD TO SEEK REVIEW UNDER THE FUNDAMENTAL LAW OF OKLAHOMA AND USE OF SUCH METHOD DENIED THE PETITIONER BOTH DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

The petitioner herein contends that the overwhelming usage and case law in Oklahoma has limited the application of the extraordinary Writ of Prohibition to cases in which the

Judge has clearly exceeded jurisdictional authority. Thus, in *Mathews v. Powers*, 425 P.2d 479 (1967).

> [8] It is clear to this Court that the information in this case alleges the commission of a crime . . . of which the District Court has no jurisdiction. Further, it is not necessary for this Court to consider petitioner's complaint concerning matters involved in search and seizure, insofar as those are questions to be considered on appeal.
>
> [9] We are thoroughly conscious of the fact that a Writ of Prohibition is an extraordinary Writ, and will never be awarded when other remedies are available, such as appeal or other modes of review, but will be issued to prevent an inferior Court from proceeding in an action over the subject matter of which it has no jurisdiction.

Other cases have made it clear that the extraordinary Writ or Prohibition is not available to correct erroneous rulings of law, but only when a Judge exceeds authority or jurisdiction. Thus, in *Walker v. Smith*, 426 P2d 375 (1967) the Court held that a Judge should be given an opportunity to rule on a Motion to Quash, and that such ruling should be reviewable only on appeal.

The Oklahoma Court as recently as 1972 said that the sustaining or overruling of a Motion to Suppress, where a magistrate has jurisdiction of the subject matter and the person of the defendant, is not subject to the extraordinary Writ of Mandamus, nor is Prohibition a proper remedy. *State, ex rel Fallis v. Caldwell*, 498 P.2d 426 (1972).

Here, then is a classic instance where well-established case law and procedural rules are disregarded in petitioner's singular case. Here was no pretense of overruling former case law, but a difference in application of procedural and

substantive rules of law to the petitioner, in which no opportunity was ever given to attack the procedure. The result is a denial of Due Process and equal protection of the law under the Fourteenth Amendment, much as in the case of *NAACP v. Alabama*, 84 S.Ct. 1302, 377 U.S. 288, 12 L.Ed. 2d 325 (1964).

It is emphasized that the State had a remedy at Law to appeal the final orders of petitioner, that the well-established rule was to deny the issuance of a Writ in such a situation, but that such Writ was granted by the Court of Criminal Appeals, without considering any of these arguments.

IV.

THE PETITIONER WAS DENIED NOTICE AND AN OPPORTUNITY TO BE HEARD, AND NO EXIGENT CIRCUMSTANCES EXISTED TO DENY HIM THOSE OPPORTUNITIES, AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The idea that notice and hearing are fundamental requirements under the Fourteenth Amendment is a well-established one. In cases in Oklahoma where original proceedings are commenced and extraordinary relief is prayed for, the following steps are regularly taken.

1. An application to assume original jurisdiction is filed, along with a petition for granting the writ.

2. A hearing date is requested and given, notice to that effect given and briefs may be directed to be filed as provided in Title 22 Okla. Stat. Chapter 18, Rule 6.

3. Only in emergencies is a peremptory writ granted, otherwise an alternative writ is granted and the respondent given an opportunity to show cause.

The only action taken in the original proceeding sought to be reviewed herein was the filing of a petition for Writ of Prohibition. No hearing was had, no briefs were presented, no notice was given, no show cause was ordered. Instead an order granting the Writ without opinion was entered by the Court of Criminal Appeals. The petitioner should at least have been given an opportunity to present not only his views as to the correctness of his own rulings below, but also in respect to the complete inapplicability of an original action to the facts and circumstances surrounding those rulings.

In *United States v. Thomas,* 282 F. Supp 729 (1968), it was held that the State could not single out a petitioner, accidentally or purposely and deny him procedural rights it accorded to others before, during, and after his case. This is what happened to the petitioner herein in the original proceeding below, and "basic fairness" simply has not been achieved.

CONCLUSION

Unless this petition for certiorari be granted, a continued reliance on improper arrest procedures in First Amendment cases will result in unlawful and unnecessary trials and convictions in a number of past, pending and further cases, to the ultimate detriment of the State, the accused, and the petitioner herein. The procedures now approved by the Court of Criminal Appeals in granting the Writ of Prohibition is constitutionally impermissible under the First, Fourth and Fourteenth Amendments of the Constitution, in that it allows police officers to make an initial determination of obscenity.

The petitioners right to Due Process and equal protection has been infringed by failure to follow the State's own case law and procedure and denial of notice and an opportunity to be heard. For the reasons set forth in the Petition herein, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

No. ____

THE STATE OF OKLAHOMA, ex rel
S. M. FALLIS, Jr., DISTRICT
ATTORNEY OF TULSA COUNTY,
OKLAHOMA,
Petitioner,

v.

HONORABLE WILLIAM WALTER MEANS,
DISTRICT JUDGE
14th JUDICIAL DISTRICT, TULSA COUNTY
OKLAHOMA,
Respondent.

Writ Granted: October 18, 1973

PETITION FOR WRIT OF PROHIBITION

I.

COMES now S. M. Fallis, Jr., the District Attorney for the 14th Judicial District, in and for and on behalf of the State of Oklahoma, and requests this Court to take judicial jurisdiction in this matter.

II.

Your Petitioner asks this Court to issue its Writ prohibiting the Honorable William Walter Means, one of the District Judges of the 14th Judicial District sitting in Tulsa County from enforcing its Order dismissing the cases as hereinafter set out at a hearing to Suppress the evidence in six separate cases, case numbers CRF 73-744, State of Oklahoma, Plaintiff, vs. Bettye Jean Terhune, Defendant; CRF 73-746, State of Oklahoma, Plaintiff, vs. Don E. Morris, Defendant; CRF 73-747 State of Oklahoma, Plaintiff, vs. Floyd Dale Combs, Defendant; CRF 73-750 State of Oklahoma, Plaintiff, vs. James Lloyd Oliver, Defendant; CRF 73-877, State of Oklahoma, Plaintiff, vs. Janie Henry, Defendant; CRF 73-748, State of Oklahoma, Plaintiff, vs. Edward H. Moses, Defendant.

Your Petitioner states that on May 22, 1973, preliminary hearings were held in four of these cases and on June 5, 1973, preliminary hearings were held in the two additional cases. All of the cases were bound over for trial. The evidence in those cases was that the Police Officers' made purchases of each of the magazines which were being offered for sale to the public through six separate so-called "Adult Bookstores;" that each of the magazines showed acts of sexual intercourse and/or unnatural copulation in violation of 22 O.S. 1040.51 and 22 O.S. 1021; that immediately after said purchases the Officers placed the persons under arrest who had sold the magazines and then confiscated this magazine and four or five copies of the same magazine which were on the bookshelves offered for sale; that the Officers after placing each person under arrest took as evidence the currency *which serial numbers of the bills had been previously noted by each Officer before approaching the stores.*

The examining magistrate in each of the cases, following McCrary vs. State, Court of Criminal Appeals No. A-17032, and No. A-17148 Potter vs. State holding 21 O.S. 1040.51 to be constitutional held the books showed acts of intercourse and/or unnatural copulation and required no expert testimony as to obscenity and were sufficient in themselves for the determination of obscenity;

Petitioner would further state that on July 24, 1973, at a hearing on a Motion to Quash and Suppress before the Honorable William Walter Means, one of the District Judges of the 14th Judicial District in and for the County of Tulsa, Oklahoma, Judge William Walter Means sustained the defendant's Motion to Quash and Suppress and ordered the cases dismissed, holding that:

1. The purchase by the Officers was a subterfuge since they immediately arrested the defendants and took the money back, *whose serial numbers were previously noted.*

2. The recent case of Marvin Miller vs. State of California, No. 70-73 decided by the Supreme Court of the United States on June 21, 1973, changed the standards to be imposed by the State Statutes and the Court of Criminal Appeals of the State of Oklahoma, recent decision of McCrary vs. State, supra, must be reexamined by the State Court of Criminal Appeals.

3. That the Oklahoma Statute 21 O.S. 1040.51 is an obscenity statute and therefore evidence must be offered to show the obscenity tests as set out by Miller vs. California, supra.

4. That the Officers' who made the purchases and arrests based on said purchases were therefore not qualified to make a determination as to obscenity and rather should have taken the magazines to an unbiased magistrate and let him make a judicial determination that these magazines were obscene and if such a finding is made issue a warrant for the arrest of the person who sold the material.

Petitioner would further state that after the Honorable Judge William Walter Means made his ruling, he then from the

bench examined the magazines and stated that under anyone's standards these magazines were obscene and constituted hard core pornography. Whereupon, the State requested that Judge William Walter Means withhold his ruling until the State could have an opportunity to sue out a Writ of Prohibition with the State of Oklahoma Court of Criminal Appeals, which request was granted. Thereafter, the State of Oklahoma, filed their designation of record requesting the Court Clerk of Tulsa County, District Court, assemble the transcripts of the preliminary hearing and the hearing on the Motions, Pleadings and Appearance Dockets in the above styled cases.

Petitioner further states that the Honorable William Walter Means had no legal authority or jurisdiction to sustain the Motions to Quash and Suppress in view of the McCrary case and the recent United States Supreme Court decisions and Potter vs. State A-17148, and on the contrary had a duty under his oath and laws of the State of Oklahoma to follow and give precedence to the decisions by the Court of Criminal Appeals of the State of Oklahoma.

WHEREFORE, premises considered your Petitioner, S. M. Fallis, Jr., District Attorney of Tulsa County, states that the Honorable Judge William Walter Means exceeded his authority and jurisdiction and exercised a judicial power not granted to him by the laws of the State of Oklahoma, and states that your Petitioner has no other adequate remedy at law and prays that this Court assume original jurisdiction and issue its Order Prohibiting the Honorable William Walter Means, District Judge of Tulsa County, Oklahoma, from the enforcement of his aforesaid Order.

THE STATE OF OKLAHOMA
S. M. FALLIS, Jr.,
DISTRICT ATTORNEY

/s/RONALD SHAFFER,
ASSISTANT DISTRICT ATTORNEY.

APPENDIX "B"

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. P-73-178 .

THE STATE OF OKLAHOMA, ex rel
S.M. FALLIS, JR., DISTRICT ATTORNEY
OF TULSA COUNTY, OKLAHOMA,
Petitioner,

v.

HONORABLE WILLIAM WALTER MEANS,
DISTRICT JUDGE, 14TH JUDICIAL DISTRICT,
TULSA COUNTY, OKLAHOMA,
Respondent.

ORDER GRANTING PROHIBITION
Filed October 18, 1973

After a study of the record in the above entitled cause and a review of recent decisions of the Supreme Court of the United States, it is this Court's opinion the Petitioner's application for prohibition should be granted.

IT IS, THEREFORE, THE ORDER OF THIS COURT this Court will assume original jurisdiction and prohibition be, and hereby is, granted with the Honorable William Walter Means directed to not enforce his order dismissing the cases in the above entitled cause at the herein mentioned suppress hearing.

WITNESS OUR HANDS, and the Seal of this Court, this 18th day of October, 1973.

/s/ C.F. BLISS, JR., PRESIDING JUDGE
/s/ HEZ J. BUSSEY, JUDGE

ATTEST:

/s/Ross R. Lillard, Jr.
CLERK

APPENDIX "C"

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. P-73-178

THE STATE OF OKLAHOMA, ex rel
S.M. FALLIS, JR., DISTRICT ATTORNEY
OF TULSA COUNTY, OKLAHOMA,
Petitioner,

v.

HONORABLE WILLIAM WALTER MEANS,
DISTRICT JUDGE, 14TH JUDICIAL DISTRICT,
TULSA COUNTY, OKLAHOMA,
Respondent.

Filed: November 1, 1973

APPLICATION FOR REHEARING

Comes now the Respondent in the above entitled action. The Honorable William Walter Means, by and through his attorney Don E. Gasaway, and respectfully shows this Court as follows. ONE: That on the 24th day of July, 1973, the respondent judge ruled on motions to quash and suppress of the defendants in certain criminal informations filed by the District Attorney of Tulsa County under 21 O.S. 1040.51. Applying recent U.S. Supreme Court decisions to search, seizure, and lawful arrest questions presented, said judge ordered the sustaining of the motions and dismissal of the charges, to which rulings the State excepted.

TWO: That the State requested and was granted a suspension of the order of dismissal, so that a petition for writ of prohibition might be filed herein. The petition was filed and the writ prayed for was granted by this Court on the 18th day of October, 1973. That said writ was granted without this Court or the respondent judge having had the benefit of a hearing, adversary briefing, or any other argument on the points of law raised. This Court granted said writ summarily in that the respondent judge was neither requested or notified to appear and show cause or otherwise respond to the petition for the writ.

FOUR: That said writ was granted without regard to the appropriateness thereof, and that should this application for rehearing be granted, the respondent would show this Court that an adequate remedy at law existed for the State to appeal the rulings of the district court judge on a reserved question of law pursuant to 22 O.S. Sec. 1053(3), that such remedy was the sole and exclusive method by which the State should have proceeded, and that the extraordinary writ of prohibition would not lie where an adequate remedy at law was available, as in the instance herein. Further, should the order granting the writ stand, this Court will be instituting a new and unwarranted method for the State to appeal final

orders of district judges, not authorized by the provisions of 22 O.S. Sec. 1053, or by the Caldwell rule for appealing magistrates rulings, in plain contravention to well established rules of law in Oklahoma.

FIVE: That the respondent judge neither abused his discretion nor went beyond his jurisdiction of the subject matter in ruling on the points of law raised in the criminal cases, and that therefore a writ of prohibition will not lie, and a direct appeal of the rulings as made constitutes the only proper remedy for the State.

SIX: That the identical legal argument adopted by the respondent, Judge Means, in the rulings sustaining the defendants' motions in the criminal cases heard by him has been fully adopted by this very Court in a written opinion handed down within one weeks time of the granting of the writ herein, namely in the case of *Melton v. State* 44 O.B.J. ___ (October, 1973), concerning the necessity of a prior judicial determination of obscenity before an arrest or confiscation can be sustained.

SEVEN: That a failure to reconsider this order will result in violations of the constitutional rights of the respondent judge, and of the defendants to the criminal charges, under the 1st, 4th, 5th, and 14th Amendments to the U.S. Constitution.

In addition to the foregoing, all of which raises the constitutional issues, due process was further inhibited in this matter because the State was improperly before the Court of Criminal Appeals in any or all of the following particulars; failing to file an application for this honorable Court to assume original jurisdiction, failing to file a notice coupled with a request and receipt of a hearing date for an adversary hearing, failing to file a brief in support of the petition, or if filed, failure to provide respondent with a copy so that a response could be given, or otherwise failing to take any action beyond the simple filing of the petition.

EIGHTH: On the basis of the bare application and the assertions therein, some of which do not comport to the facts as developed in the transcript of the proceedings below, the Court has issued its order granting the writ, apparently without having before it for consideration any of the determinative issues presented herein or supported by any authority. That said action is in fact taken in contravention to well-established rules and principles more specifically referred to in the brief accompanying this application.

WHEREFORE, from all the foregoing, the respondent herein respectfully requests that this honorable Court reconsider the summary pronouncement of the order granting prohibition herein, and that this Court proceed to request and allow adversary briefing, oral argument, or any other available procedures to fully discuss and resulve the points of law raised herein.

Respectfully presented,
WOODSON & GASAWAY

by /s/ Don E. Gasaway

APPENDIX "D"

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. P-73-178

THE STATY OF OKLAHOMA, ex rel
S.M. FALLIS, JR., DISTRICT ATTORNEY
OF TULSA COUNTY, OKLAHOMA,
Petitioner,
v.

HONORABLE WILLIAM WALTER MEANS
DISTRICT JUDGE, 14TH JUDICIAL DISTRICT,
TULSA COUNTY, OKLAHOMA,
Respondent.

Filed: November 14, 1973

ORDER DISMISSING APPLICATION FOR REHEARING

As there is no provision in the Court Rules for rehearing on a writ of prohibition, the Application for Rehearing on the Order issued granting prohibition on October 18, 1973, is hereby dismissed.

IT IS, THEREFORE, THE ORDER OF THIS COURT Petitioner's Application for Rehearing be, and hereby is, dismissed.

WITNESS OUR HANDS, and the Seal of this Court, this 13th day of November, 1973.

/s/ C. F. BLISS, JR.
PRESIDING JUDGE

/s/ HEZ J. BUSSEY, JUDGE

ATTEST:

/s/ Ross N. Lillard, Jr.
CLERK

FILED
APR 29 1
MICHAEL RODAK, JR.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1237

Honorable William Walter Means, District Judge, 14th Judicial District, Tulsa County, Oklahoma,
Petitioner,

versus

The State of Oklahoma,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION

Larry Derryberry
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Counsel for Respondent

April, 1974

Utterback Typesetting Co., 519 W. Calif., Oklahoma City, Ph. 235-0080

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1237

HONORABLE WILLIAM WALTER MEANS, DISTRICT JUDGE, 14TH JUDICIAL DISTRICT, TULSA COUNTY, OKLAHOMA,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals on a petition for writ of prohibition in the State of Oklahoma *ex rel.*, S. M. Fallis, Jr., District Attorney of Tulsa County, Oklahoma, vs. the Honorable William Walter Means, District Judge, Fourteenth Judicial District, Tulsa County, Oklahoma, respondent, Case No. P-73-178, is attached as an appendix to the petition for a writ of certiorari in this case and will not be attached to the brief in opposition.

JURISDICTION

The State of Oklahoma would challenge the jurisdiction as set out in the petition for writ of certiorari, and the arguments thereto will be set forth in this brief.

QUESTIONS PRESENTED FOR REVIEW

1. Does the petitioner herein have standing to raise the question of First Amendment rights in the present case?

2. Does the petitioner herein have standing under Article III of the United States Constitution to maintain this action as a writ of certiorari?

3. Do the rights under the First Amendment of the United States Constitution as alleged in the petition for writ of certiorari apply to the petitioner in this case?

4. Has the petitioner herein alleged a justiciable issue as required by Article III of the United States Constitution?

STATEMENT OF FACTS

The petitioner herein is a District Judge in the Fourteenth Judicial District, Tulsa County, Oklahoma, and was the trial judge assigned to try the following cases: *State* v. *Betty Jean Teerhune*, CRF-73-744; *State* v. *Morris*, CRF-73-746; *State* v. *Combs*, CRF-73-747; *State* v. *Moses*, CRF-73-748; *State* v. *Oliver*, CRF-73-740; and *State* v. *Henry*, CRF-73-877.

The defendants in the above styled cases have been charged in the District Court of Tulsa Couity and a preliminary hearing was had in all cases and all defendants

were bound over for trial. Upon the cases being assigned to the trial court, a hearing was had on motions to suppress on July 24, 1973, before the Honorable Judge Means. The petitioner at that time made a ruling suppressing the evidence and it was his decision to dismiss the cases. Before dismissal of the cases, the District Attorney of Tulsa County, Oklahoma, asked that the decision of the Court be withheld pending an appeal by the State. An appeal was perfected by the State by a writ of prohibition to the Court of Criminal Appeals and that Court issued an order of prohibition to the Honorable Judge Means and reinstating the cases for trial. Those six cases are presently still pending on the trial docket in Tulsa County, Oklahoma.

From the order of the Court of Criminal Appeals of the State of Oklahoma, the petitioner has filed his petition for certiorari with this Honorable Court.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari as filed herein challenges the ruling of the Court of Criminal Appeals of the State of Oklahoma, alleging that the order of that Court on the writ of prohibition is denying the petitioner his First Amendment rights. The petitioner further alleges that his rights under the Fourteenth Amendment of the United States Constitution have been violated in a procedural process on the writ of prohibition in the state court.

The State alleges that no First Amendment rights of the petitioner herein have been violated by this order and that the petitioner has presented no justiciable issue which can be decided by this Honorable Court on a writ of certi-

orari. The State therefore contends that the petition for a writ of certiorari should be denied.

The argument in this case will be set out in two propositions below.

ARGUMENT

PROPOSITION I

THE COURT SHOULD NOT GRANT CERTIORARI AS TO THE FIRST AMENDMENT QUESTION AS THOSE QUESTIONS DO NOT PERTAIN TO THE PETITIONER HEREIN AND THAT FURTHER, THOSE QUESTIONS HAVE NOT BEEN FINALLY DETERMINED BY THE HIGHEST STATE COURT.

The petitioner in this case is Judge of the District Court of Tulsa County, Oklahoma, and was assigned as trial judge on six cases. Those six criminal cases involved the question presented in *Miller* v. *California*, — U.S. —, 37 L.Ed.2d 419, 93 S.Ct. —, and *Paris Adult Theatre* v. *Slaton*, — U.S. —, 37 L.Ed.2d 446, 93 S.Ct. —, as decided June 21, 1973. In those six cases, the defendants had all been bound over for trial after a preliminary hearing.

The Honorable Judge Means on a hearing on a motion to suppress, held that the evidence should be suppressed and withheld his ruling to dismiss the cases, until the State was able to appeal to the Court of Criminal Appeals for the State of Oklahoma.

The District Attorney of Tulsa County, Oklahoma, took an appeal by way of writ of prohibition to the Court of Criminal Appeals and that Court issued the writ and in effect reversed the ruling of Judge Means.

The Court of Criminal Appeals of the State of Oklahoma, in no way decided any of the constitutional rights of the six original defendants. The Court in making its decision also did not decide any of the First Amendment rights of the petitioner herein.

The reversal of the ruling in the state court did not touch upon the First Amendment question presented in this case by the petitioner. The state court, by its ruling, did not in any way infringe upon the First Amendment rights of Judge Means. The First Amendment rights as alleged in the petition would only be as to the defendants in the six criminal cases still pending in the District Court of Tulsa County, Oklahoma.

Therefore the defendants in the six criminal cases, still have all the state remedies available to them and are not original parties to this suit. *Street* v. *New York* (N.Y. 1969), 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed. 572, *on remand* 302 N.Y.S. 448, 24 N.Y.2d 1026, 250 N.E. 250, and *Evans* v. *Delaware County, Pennsylvania* (C.A. Pa. 1968), 390 F.2d 617, *cert. denied* 89 S.Ct. 164, 393 U.S. 873, 21 L.Ed.2d 143.

Therefore, the State of Oklahoma respectfully prays that certiorari be denied, as to the First Amendment questions presented in the brief of the petitioner, for the foregoing reasons.

PROPOSITION II

CERTIORARI SHOULD BE DENIED AS NO JUSTICIABLE ISSUE HAS BEEN PRESENTED AS REQUIRED BY ARTICLE III OF THE UNITED STATES CONSTITUTION.

This case arose from an order of the Court of Criminal Appeals of the State of Oklahoma on a writ of prohibition, directed to the petitioner herein. The petitioner is challenging the right of the Oklahoma Court of Criminal Appeals to issue the writ. There are no allegations by the petitioner that he has been harmed or injured by the ruling in any way.

The summary ruling by the state court is a procedure which is used not only in the extraordinary writs in that court, but in regular and post conviction appeals. Therefore, that court did not abuse the right of petitioner in deciding the writ without argument or a brief. Petitioner was sent a copy of the petition on the filing of that document in the state court.

If he had wanted to challenge the jurisdiction of the court, it should have been done at the time of receiving notice of such filing before the court summarily decided the issue.

The order of the state court, in effect, only sent the six cases involved back to the petitioner and the District Court of Tulsa County, Oklahoma, for trial. That order did not affect the petitioner's constitutional rights in any way, except for the trial of the six cases.

The order of the state court did not answer any of the First Amendment questions which were attempted to be

resented here and the state court has now, on appeal, the uestions presented in *Miller* and *Paris, supra*. Those cases n appeal with the Court of Criminal Appeals of the State f Oklahoma did not involve any of the original six de-endants in the cases in the petitioner's court.

The petitioner herein has not shown how he would be dversely affected by this ruling. His only complaint is that llegal arrests might be made, which is a question the state ourts have not decided. The only inference which can be drawn from the petition for writ of prohibition and the opinion in the state court, is that the petitioner acted without jurisdiction. It should be noted that the petition for a writ of prohibition in the state court prayed that the petitioner be prohibited from acting without authority and jurisdiction.

The question of due process in this case, is not the actual point which is sought to be considered. The real questions, are those of the First Amendment rights as previously set out.

We would therefore seriously question the standing of the petitioner to maintain this action. The petitioner herein has no personal stake in the outcome of the questions involving the First Amendment rights of the original six defendants. The order on a petition of writ of prohibition did not adversely affect the petitioner in any way.

The interest of the petitioner and the State of Oklahoma should be and are the same. That is to see that justice is done in all cases.

The petitioner in this action is not being placed in a position of a criminal prosecution and cannot suffer any effects from the decision as in *Jenkins* v. *McKeithen*, 395 U.S. 411, 23 L.Ed.2d 404, 89 S.Ct. 1843.

The petitioner will not suffer any physical or economic detriment as in *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947, 888 S.Ct. 1942.

The only averments of injury that appear in the petition for writ of certiorari are simple allegations in a general and speculative nature. The petitioner has not shown any real injury, either past, present or future, which he has suffered. He has therefore failed to meet the requirements imposed by Article III of the United States Constitution. *O'Shea* v. *Littleton*, — U.S. —, 38 L.Ed. 674, 94 S.Ct. —.

Therefore, since petitioner does not have any personal stake in the outcome, *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 891 (1962), and since there is no adverse interest to be served, *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 81 L.Ed. 617, 57 S.Ct. 461, 108 A.L.R. 1000 (1937), the State respectfully requests that certiorari be denied herein.

CONCLUSION

For the foregoing reasons, it is the position of the State of Oklahoma, that a writ of certiorari should not issue as there are no constitutional questions to be decided by this Court as to this petitioner and that the petitioner has not shown an issue to be decided by this Honorable Court.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105
MARVIN C. EMERSON
First Assistant Attorney General

Counsel for Respondent

April, 1974

CERTIFICATE OF MAILING

This is to certify that I mailed three copies of the instrument to which this certification is attached to the following named counsel of record, this _____ day of April, 1974:

Woodson and Gasaway
1843 East 15th Street
Tulsa, Oklahoma 74104

Marvin C. Emerson